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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1180

WAYNE HUNTER CARLTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LEVINE & FREEDMAN, ESQS.
725 E. Kennedy Boulevard
Tampa, Florida 33602

ATTORNEYS FOR PETITIONER

FREE PRESS PUB. CO., INC. - TAMPA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. _____

WAYNE HUNTER CARLTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Wayne Hunter Carlton, prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit issued in this case on March 28, 1968, wherein Wayne Hunter Carlton was Appellant and the United States of America was Appellee.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit dated March 28, 1968 in connection with which opinion a Mandate issued April 18,

1968, which was filed with the Clerk of the District Court for the Eastern District of Arkansas, Western Division, on April 22, 1968. The aforesaid opinion is printed in Appendix hereto, in P. A-2, and is reported in 391 F.2d 684 which reported opinion affirmed the conviction returned after a jury trial in the District Court.

JURISDICTION

Petitioner, Wayne Hunter Carlton, was convicted by a jury at the close of a trial in the United States District Court for the Eastern District of Arkansas, Western Division, from which conviction he took an appeal to the United States Court of Appeals for the Eighth Circuit, which conviction was affirmed by an opinion dated March 28, 1968. (Appendix A-2).

Immediately upon being advised of the affirmance of the conviction, Petitioner advised his trial and Appellate counsel, Edward L. Garnett, that he was desirous of filing a Petition for a Writ of Certiorari to the Supreme Court of the United States, and directed him so to do. Thereafter, a Motion for Extension of Time for Filing an Application for Petition for Writ of Certiorari for Stay of Execution was prepared by said Edward L. Garnett, Esquire, and by him forwarded to the Clerk, U. S. Court of Appeals for the Eighth Circuit (Appendix A-8). The letter transmitting the aforesaid Motion was not deposited in the United States Mail until April 30, 1968, and the Clerk of the Appellate Court determined that same was untimely and refused to file same (Appendix A-10). Thereafter, Petitioner's present attorneys filed with the U. S. District Court, Eastern District of Arkansas, Western Division, a Motion to Extend Time to File Petition for Writ of Certiorari (Appendix A-11) which Motion was filed

pursuant to Rule 45(b) Federal Rules of Criminal Procedure in connection with which Motion an Order dated May 16, 1968 was entered by the District Judge (Appendix A-15). It is indisputable that a person charged with a criminal offense has a right to invoke all post-conviction remedies then available as an element of due process of law and of equal protection of law.

The Trial Court during the course of the trial and the Appellate Court in affirming the conviction as hereinabove indicated, approved of the admission and evidence of illegally seized matter violative of the Fourth Amendment to the United States Constitution, and the said opinion is in conflict with other decisions by Courts of Appeal and of this Court and is a departure from the accepted course of judicial proceedings thereby vesting jurisdiction in this Court pursuant to the provisions of 28 U.S.C.A. Rule 19(b).

QUESTIONS PRESENTED

1. Whether the failure of Petitioner's trial and Appellate counsel to timely file a Motion for Extension of Time within which to file an Application for Petition of Writ of Certiorari and for Stay of Execution constitutes a waiver of Petitioner's rights to invoke all post-conviction remedies then available to him?

2. Whether the search of a hotel room registered in Petitioner's name after his arrest and incarceration for parole violation was an illegal search and seizure contrary to the Fourth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS RULES AND STATUTES INVOLVED

Section 1, Amendment XIV, United States Constitution, Amendment IV, United States Constitution, Amendment VI, United States Constitution, 18 U. S. C. A. 45(b).

STATEMENT

Petitioner, was convicted by a jury, after trial in the United States District Court, for the Eastern District of Arkansas, Western Division, wherein he was charged with transporting or causing to be transported in Interstate Commerce, a falsely made and forged check from Little Rock, Arkansas, to Atlanta, Georgia, on November 14, 1964, in violation of 18 U.S.C. Section 2314. As a consequence of the aforesaid conviction, he was sentenced to a term of four years which was subsequently reduced by an Order dated July 17, 1968 to two years which sentence he is presently serving.

Subsequent to the aforesaid conviction, Petitioner took an Appeal to the United States Court of Appeals for the Eighth Circuit which Court by an opinion dated March 28, 1968 affirmed Petitioner's conviction.

Immediately upon being advised of the affirmance of the conviction, Petitioner advised his Trial and Appellate counsel, Edward L. Garnett, that he was desirous of filing a Petition for a Writ of Certiorari to the Supreme Court of the United States and directed him so to do. Thereafter, the said Edward L. Garnett, Esquire filed a Motion for Extension of Time for Filing an Application for Petition for Writ of Certiorari for Stay of Execution, but undenounce to Petitioner and through no fault of his, the Motion was forwarded to the Clerk of the Court of Appeals untimely (Appendix A-10).

Thereafter, Petitioner employed his present attorneys who filed with the District Court a Motion to Extend Time to File Petition for Writ of Certiorari (Appendix A-11) which Motion was denied by order dated May 16, 1968 (Appendix A-15).

Thereafter, a Motion for Reduction of Sentence was filed in behalf of Petitioner and an Order reducing the sentence from four years to two years was entered July 17, 1968 (Appendix A-16).

Accordingly, through no fault of Petitioner, this Petition for Writ of Certiorari is being untimely filed and Petitioner seeks that this Court determine the Constitutional issues raised in regard to the illegal search and seizure of certain property that was admitted in evidence.

On January 28, 1965, the police of Monroe, Louisiana, were informed that Petitioner, who was wanted as a Florida parole violator, was registered at a local motel with his wife and a Mr. Freeman and a female companion. The two couples occupied adjoining rooms, 711 and 713; both of which were registered in Petitioner's name.

A police officer went to the motel and after knocking on the door of room 713 was invited to enter, although he did not identify himself prior thereto, and upon entering the said room, he saw two women standing in 713, and saw the defendant enter 713 through the open door to the adjoining room, 711. The officer placed the Petitioner under arrest, and took him to police headquarters, at which time, without any warning whatsoever of Petitioner's rights, a consent to search the hotel rooms were obtained from Petitioner.

Mr. Freeman, who had previously been arrested, had signed a consent to the police searching room 711, in which room the evidence that was seized had previously been placed.

About an hour and a half after Petitioner's arrest, the arresting officer returned to the hotel room and searched both rooms at which time he found and seized certain blank checks which were later used in evidence during the course of the defendant's trial, over objection.

REASONS FOR GRANTING THE WRIT

1. The search of a man's home or his motel room one and a half hours after he has been arrested pursuant to a "consent" obtained without warning of his rights during a period of incarceration is violative of the Fourth Amendment to the United States Constitution and the admission in evidence of the seized items cannot be reconciled with the opinion in *United States v. Lavalee*, 391 Fd. 2d 123 (1968 Second Cir.); and the opinion in *Preston v. United States*, 376 U.S. 364 (1964); *Stoner v. California*, 376 U.S. 483 (1964), and *James v. Louisiana*, 86 Supreme Court 151 (1965).

2. The search of the motel rooms registered in Petitioner's name coming approximately one and a half hours after his arrest and during the period of his incarceration was conducted without a Search Warrant where it was practicable to obtain a Search Warrant and the admission in evidence of the matter seized is violative of and in conflict with *Trupiano v. United States*, 334 U.S. 699 (1948); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Ventresca v. U. S.*, 85 Supreme Court 741 (1965), and *Wong Sun v. United States*, 371 U.S. 471 (1963).

3. As a matter of significant Constitutional right of due process of law and equal protection of law, Petitioner had a right to invoke all post-conviction remedies that were available to him at the date that the Court of Appeals affirmed his conviction. The failure of his retained attorney to timely file a Motion for Extension of Time to File the Petition for Certiorari and an Application for Stay is clearly a violation of Petitioner's right that should not prejudice this Court's consideration of this Petition. In *Gideon v. Wainwright*, 372 U.S. 335 (1963) this Court settled for all time the right of an indigent to have counsel and it was clear in that opinion that that counsel must be competent, if for all intents and purposes we are concerned with providing due process of law. The fact that Petitioner's attorney had been retained by him does not in any way mitigate against this fundamental proposition and counsel's failure in that regard is violative of such a fundamental right that the procedure of default of counsel's failure to timely file the aforesaid Motion should not be considered equivalent to an express waiver of a Constitutional right on Petitioner's part that will preclude this Court from considering the merits of the Petition on the issue of search and seizure. *Douglas v. California*, 372 U.S. 353, 9 L.Ed 2d 811 (1963) and *Young v. State*, 177 So.2d 345 (Fla. 1965).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEVINE & FREEDMAN

By _____
ARNOLD D. LEVINE
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Writ of Certiorari have been served by mail upon the Solicitor General, Washington, D. C., and on the United States Attorney for the Eastern District of Arkansas, Little Rock, Arkansas 72203, on this _____ day of September, 1968.

_____
ARNOLD D. LEVINE

APPENDIX A

AMENDMENT IV
UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

AMENDMENT VI
UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV
UNITED STATES CONSTITUTION

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,837

Wayne Hunter Carlton,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[March 28, 1968.]

Before BLACKMUN, GIBSON and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

Wayne Hunter Carlton appeals from a conviction of transporting or causing to be transported in interstate commerce, a falsely made and forged check from Little Rock, Arkansas, to Atlanta, Georgia, on November 14, 1964, in violation of 18 U.S.C. §2314 (1964 ed.). He was sentenced to four years.

The evidence presented at the trial was, in our view, sufficient to sustain the verdict[1] and was substantially as follows: The defendant negotiated a check in a

[1] There can be no question that the sufficient intent was proven where, as in this case, the check was drawn on a bank in another state and thus would, of necessity, have to travel in interstate commerce. *Hall v. United States*, 372 F.2d 603 (8th Cir. 1967).

Little Rock, Arkansas, store on November 14, 1964. It purported to be a check of the American Oil Company, payable to "Mr. T. F. Butler" and drawn on an Atlanta, Georgia, bank. The defendant purported to be the payee, stating that the check was his pay check. In fact, the oil company had no account with the drawee bank and the signature of the drawer was a forgery.

The defendant was identified, at trial, by the owner of the store who approved the check and by the salesman who waited on him.

On January 28, 1965, the police of Monroe, Louisiana, were informed that the defendant, who was wanted as a Florida parole violator, was registered at a local motel with his wife and a Mr. Freeman and a female companion. The two couples occupied adjoining rooms, 711 and 713; both of which were registered in the name of H. Hunter.

Assistant Police Chief Johnson went to the motel with another officer. He knocked on the door of room 713, and a female voice invited him in. Upon entering the room, he saw two women standing in 713, and saw the defendant enter 713 through the open door to the adjoining room, 711. He also noted some blank checks in an attache case in 711. These checks were plainly visible, however, he did not examine them closely at that time. He placed the defendant under arrest, and took him to police headquarters.[2] There, the defendant

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[2] Officer Johnson had arrested Freeman in a department store parking lot immediately before going to the motel. The grounds for Freeman's arrest were vagrancy and suspicion of auto theft.

When arresting the defendant, Officer Johnson asked Mrs. Carlton and Freeman's female companion if they wished to accompany him to Headquarters. They accepted his invitation and were arrested for vagrancy upon arriving at Headquarters.

signed a consent to search 713, and Freeman signed a consent to search 711.[3]

About an hour and a half after the arrest, the Assistant Police Chief returned to the motel and searched both rooms. The clothing of the defendant and his wife was located solely in 713, and Freeman's in 711. However, a revolver and one other article of personal property belonging to the defendant and his wife were found in 711. He found and seized the blank checks which he had observed on his earlier visit and which were still in 711.

The prosecution called the Assistant Police Chief as a witness, and it was he who testified as to what took place in Monroe. The defendant objected to the officer's testimony in its entirety on the grounds that it was based on observations made during an illegal search and was too remote to be relevant. The defendant simultaneously objected to the introduction of the evidence seized in the search (the blank check) on the grounds that the search was not incidental to a lawful arrest and on further grounds that the defendant had consented to the search of 713 but not 711.

The trial court ruled that if, in fact, Freeman was the sole occupant of 711, then the consent that he signed gave the police proper authority to search that

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[3] The defendant signed the following mimeographed consent form (Italicized portions indicate handwriting):

"This is to certify that I, *Wayne H. Carlton,* do hereby and by these presents, consent that my premises located at Municipal Number *Rm. 713 Holliday Inn,* Monroe, Louisiana may be examined and searched by you, or any of your duly qualified and acting Deputies, and I do further waive the execution, presentation or service upon me of any warrant for search of the said premises, and you are further hereby authorized to seize, without further authority, any property found on said premises which may have been the subject of a theft, or otherwise involved in a felony."

Freeman's consent was not contained in the record of this case. The testimony indicated that it was identical in form to the one signed by the defendant.

room. In the alternative, the court ruled that if the defendant and Freeman were co-occupants of 711, then the defendant's consent to search 713, which he also occupied, extended to 711.

We believe that the trial court properly determined the testimony of Officer Johnson, and the exhibits introduced through him, to be relevant. "* * * Only with reluctance will the Court of Appeals substitute its judgment for that of the trial judge * * *. The trial court's determination of legal relevancy must be considered an act of discretion not to be disturbed absent a clear showing of abuse. * * *" *Cotton v. United States,* 361 F.2d 673, 676 (8th Cir. 1966). The officer's testimony had "enough rational connection with the issue to be considered a factor contributing to an answer." *United States v. Pugliese,* 153 F.2d 497, 500 (2d Cir. 1945). It is not unreasonable to infer that the defendant's subsequent possession of identical checks was some indication that he may have passed the check for which he was charged. As in most cases, this conviction resulted "from the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person," but when taken together, justify the conviction. *Ibid.*

Halfen v. United States, 321 F.2d 556 (5th Cir. 1963), *cert. denied,* 376 U.S. 934 (1964), is closely in point. There, the Court upheld a conviction in which the government had introduced evidence that subsequent to the violation the defendant was charged with, he had passed or attempted to pass forged money orders in the same series. Notwithstanding the fact that the latter instances were crimes in and of themselves, the Court permitted the testimony.

We also believe that the trial court properly refused to suppress the evidence seized in the search. In reaching this conclusion, we do not determine the validity of

the defendant's consent to the search. The law is clear that the evidence seized, pursuant to the search as authorized by Freeman, can be used against the defendant. This is true whether Freeman and his companion were the sole occupants of 711 or were joint occupants of it with the defendant and his wife.[4] *Drummond v. United States,* 350 F.2d 983 (8th Cir. 1965), *cert. denied,* 384 U.S. 934 (1966); *Reeves v. Warden, Maryland Penitentiary,* 346 F.2d 915 (4th Cir. 1965); *United States v. Sferas,* 210 F.2d 69 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954); *Driskill v. United States,* 281 F. 146 (9th Cir. 1922); *Dokes v. State,* 241 Ark. 720, 409 S.W.2d 827, *cert. denied,* 36 USLW 3161 (1967); *People v. Silva,* 140 Cal.App.2d 791, 295 P. 942 (1956); *People v. Walker,* 34 Ill.2d 23, 213 N.E.2d 552 (1966); *State v. Stuart,* 415 S.W.2d 766 (Mo. Sup. 1967); *Van Wyck v. State,* 56 Okla. Crim. 241, 37 P.2d 321 (1934); *State v. Cairo,* 74 R.I. 377, 66 A.2d 841 (1948); *Shafer v. State,* 219 Tenn. 416, 381 S.W.2d 254 (1964) (*semble*).

The defendant also objects to the introduction of evidence seized in the search of 711 on the grounds that the consents signed by him and Freeman were invalid because: (1) there was no evidence that either consent was voluntary or that either party was advised of his right to refuse consent;[5] (2) that the consents did not enumerate the items to be seized with the specificity that would have been required had the police sought a

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[4] The defendant was not present at the search of room 711, and did not expressly object to its search until trial. Compare, *Tompkins v. Superior Court,* 29 Cal. Rptr. 889, 378 P.2d 113 (1963); *Dorsey v. State,* 2 Md. App. 40, 232 A.2d 900 (1967).

[5] See generally, Hall & Kamisar 1967 SUPPLEMENT to the Second Edition of MODERN CRIMINAL PROCEDURE, and BASIC CRIMINAL PROCEDURE, p. 8-9.

search warrant; and (3) that the evidence seized (the blank check) was "mere evidence" and thus not subject to seizure.[6]

These grounds were not explicitly or implicitly asserted at trial and cannot be asserted for the first time on appeal:

> "* * * For the search and admissibility of the product of the search to be challenged on appeal, that challenge must be made in the first instance in the trial court. 'Fairness to that court and to counsel and to a reviewing court demands this. So do "fair procedural requirements"'. *Robinson v. United States,* 327 F.2d 618, 623 (8 Cir. 1964); *Gendron v. United States,* 295 F.2d 897 (8 Cir. 1961). * * *"

One 1961 Lincoln Continental Sedan v. U. S., 360 F.2d 467 (8th Cir. 1966).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[6] The defendant contends that the blank check is "mere evidence" as distinguished from an instrumentality and the Fourth Amendment prohibits the seizure of mere evidence. He cites: *Marron v. United States,* 275 U.S. 192 (1927); *Gouled v. U.S.*, 255 U.S. 298 (1921); *Takahashi v. U.S.*, 143 F.2d 118 (9th Cir. 1944). First, we note that the defendant and Freeman could and did sign a consent broad enough on its face to encompass the seizure of mere evidence. Those consents would not be implicitly limited by the cases that the defendant cites, since the Supreme Court has overruled them. *Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967) (advance sheet).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 18837
WAYNE HUNTER CARLTON, Defendant.	)	

MOTION FOR EXTENSION OF TIME FOR FILING AN APPLICATION FOR PETITION FOR WRIT OF CERTIORARI FOR STAY OF EXECUTION

COMES NOW the Defendant, WAYNE HUNTER CARLTON, and moves this Honorable Court for an extension of time to file an application for Petition of Writ of Certiorari and staying execution of the judgment pending said Writ of Certiorari and for grounds sayeth:

1. That the Defendant, WAYNE HUNTER CARLTON, is seeking associate counsel to assist his counsel of record in the preparation of a Petition for a Writ of Certiorari in the above styled cause, and additional time is going to be required for associate counsel to review the record for the purposes of assisting counsel of record in preparing the Writ of Certiorari.

WHEREFORE, the Defendant moves this Honorable Court for an extension of time for filing the application for Petition for Writ of Certiorari until the 28th

day of May, 1968, and for a stay of execution of judgment until the 29th day of May, 1968 or until such further Order of this Court.

/s/ Edward L. Garnett
EDWARD L. GARNETT
1218 South Dale Mabry Highway
Tampa, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Motion for Extension of time for Filing Petition for Writ of Certiorari for Stay of Execution has been furnished to WILLIAM F. SHERMAN, Assistant United States Attorney, Eastern District of Arkansas, Little Rock, Arkansas, and to WILBUR H. DILLAHUNTY, United States Attorney, Little Rock, Arkansas, by mail this _____ day of _____, 1968.

/s/ Edward L. Garnett
EDWARD L. GARNETT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
ST. LOUIS, MO. 63101

Robert C. Tucker, Clerk

April 30, 1968

Mr. Edward L. Garnett
Barra, Garnett & Williams
P. O. Box 18585
Tampa, Florida 33609

RE: No. 18837. Wayne Hunter Carlton v.
United States of America.

Dear Sir:

I have today received a pleading from you denominated "Motion for Extension of Time for Filing an Application for Petition for Writ of Certiorari for Stay of Execution". This pleading came via air mail — special delivery, in an envelope postmarked April 29, 1968, P.M., from Tampa, Florida.

As I indicated to you over the telephone today, I am declining to file your motion for the reason that I think any such request should be made to the Supreme Court. The opinion of this Court was filed March 28, 1968, and our mandate issued April 18, 1968. The case is, accordingly, closed in this Court.

Very truly yours,

/s/ Robert C. Tucker
Robert C. Tucker,
Clerk

RCT:k

cc: Hon. Wilbur H. Dillahunty
United States Attorney
Little Rock, Arkansas

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS.
WESTERN DIVISION.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. LR-65-CR-55
	)	
WAYNE HUNTER CARLTON,	)	
	)	
Defendant,	)	

MOTION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Defendant, WAYNE HUNTER CARLTON, by his undersigned attorneys, does hereby file this Motion to Extend the Time within which he may file a Petition for Writ of Certiorari to the Supreme Court of the United States pursuant to the provisions of Rule 45(b) Federal Rules of Criminal Procedure, and as grounds therefor states as follows:

1. The Defendant, WAYNE HUNTER CARLTON, was convicted by jury before this Court from which conviction he took an Appeal and thereafter by an opinion dated March 28, 1968, the United States Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction.

2. Immediately upon being advised of the affirmance of the conviction as hereinabove set forth, Petitioner advised his trial and appellate counsel, Edward L. Garnett, that he was desirous of filing a petition for a Writ of Certiorari to the Supreme Court of the United

States, and directed him so to do. Thereafter, a Motion for Extension of Time for Filing an Application for Petition for Writ of Certiorari for Stay of Execution was prepared by the said Edward L. Garnett, Esq., and by him forwarded to the Clerk, U. S. Court of Appeals, for the Eighth Circuit. A copy of the aforesaid Motion is annexed hereto as Exhibit "A", and made a part hereof for all purposes.

3. The Clerk of the Court of Appeals by letter dated April 30, 1968, advised Edward L. Garnett, Esq., that the aforesaid Motion was untimely filed with the Appellate Court since it was the opinion of the Clerk that the request should either be made to the Supreme Court or certainly prior to the time that the Mandate issued. A copy of the aforesaid letter is annexed hereto as Exhibit "B", and made a part hereof for all purposes.

4. No acts or conduct on the part of the Defendant in any way delayed the filing of the Motion for Extension of Time or Petition for Writ of Certiorari and the said Defendant was not advised as to the failure of his trial and appellate attorney to timely file either his Petition for Writ of Certiorari or a Motion seeking an extension of time for the filing of same until on or about May 1, 1968.

5. Thereafter, Defendant forthwith employed his undersigned attorneys and requested that they file this Motion and file an appropriate Petition for Writ of Certiorari to the Supreme Court of the United States.

WHEREFORE, Petitioner prays that pursuant to Rule 45(b) Federal Rules of Criminal Procedure this Court, based upon the excusable neglect on the part of

the Defendant's trial and appellate attorney, Edward L. Garnett, extend the time within which to file his Petition for Writ of Certiorari to the Supreme Court of the United States up to and including May 28, 1968.

LEVINE & FREEDMAN

By: /s/ Arnold D. Levine
ARNOLD D. LEVINE
725 East Kennedy Boulevard
Tampa, Florida 33602

WAYNE HUNTER CARLTON

Attorneys for Defendant

STATE OF FLORIDA)
)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, personally appeared WAYNE HUNTER CARLTON, who upon first being duly sworn, deposes and says that he is the Petitioner and Defendant referred to in the above Motion and that the matters and facts set forth therein are true and correct.

/s/ WAYNE HUNTER CARLTON
WAYNE HUNTER CARLTON

Sworn to and subscribed before me this 14th day of May, 1968.

NOTARY PUBLIC
My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Extend Time to File Petition for Writ of Certiorari has been furnished, by mail, to WILLIAM F. SHERMAN, Assistant United States Attorney, Eastern District of Arkansas, Little Rock, Arkansas, and to EDWARD L. GARNETT, ESQ., 1218 South Dale Mabry Highway, Tampa, Florida, this 14th day of May, 1968.

/s/ ARNOLD D. LEVINE
ARNOLD D. LEVINE

IN THE
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF ARKANSAS.
WESTERN DIVISION.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. LR-65-CR-55
	)	
WAYNE HUNTER CARLTON,	)	
	)	
Defendant,	)	

ORDER

In an opinion dated March 28, 1968, the United States Court of Appeals for the Eighth Circuit affirmed the defendant's conviction. He has now filed a petition in this Court asking for an order under Rule 45(b), F.R.Crim.P. extending his time for filing his petition for writ of certiorari to the Supreme Court of the United States.

This Court is of the opinion that it has no jurisdiction to grant such petition and that it should be addressed either to the United States Court of Appeals for the Eighth Circuit or the United States Supreme Court.

Therefore, the motion is denied.

Dated: May 16, 1968

/s/ GORDON E. YOUNG
United States District Judge

IN THE
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF ARKANSAS.
WESTERN DIVISION.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. LR-65-CR-55
	)	
WAYNE HUNTER CARLTON,	)	
	)	
Defendant,	)	

ORDER

The defendant was convicted in this court April 3, 1967, and sentenced to imprisonment for a period of four years.

The defendant appealed to the Court of Appeals for the Eighth Circuit and his conviction was affirmed. The Mandate of that court was filed with the Clerk of this court April 22, 1968.

Under the provisions of Rule 35, F.R.Crim.P., the sentence of four years imposed upon defendant is reduced to a term of two years imprisonment.

Dated: July 17, 1968.

/s/ GORDON E. YOUNG
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1180

WAYNE HUNTER CARLTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of transporting a forged check in interstate commerce, in violation of 18 U.S.C. 2314. He received a sentence of imprisonment for four years, which was later reduced to two years (Pet. A-16). The court of appeals affirmed on March 28, 1968. 391 F. 2d 684 (Pet. App. B). The petition for a writ of certiorari, filed on March 20, 1969, nearly a year later, is out of time under Rule 22(2) of the Rules of this Court.

Petitioner asserts that, after affirmance by the court of appeals, he directed his counsel to file a petition

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for a writ of certiorari, and that counsel's failure to do so should not prejudice him. Whether or not counsel was then derelict, the present petition is inexcusably out of time. After petitioner was informed of former counsel's failure to petition, he retained new counsel on May 1, 1968. New counsel filed in the district court a motion for an extension of time to file a petition for a writ of certiorari, which was denied for lack of jurisdiction on May 16. Counsel then filed in the district court a motion for reduction of sentence, which was granted on July 17. No action on a petition for a writ of certiorari was taken in this Court until September, 1968, when a petition was mailed to the Court but returned by the Clerk because it was not accompanied by other necessary materials. Six more months passed before the instant petition was filed. Under these circumstances, the petition should be dismissed as untimely.

In any event, the petition raises no issue of merit.

1. The evidence showed that on the afternoon of November 14, 1964, petitioner purchased a record player at the Moses Melody Shop, Little Rock, Arkansas (Tr. 5, 103).[1] He attempted to pay for the item with a check in the amount of $124.40 payable to "T. F. Butler" purportedly drawn on the American Oil Company account in the Fulton National Bank, Atlanta, Georgia, and signed by "Henry L. Carpenter," as "Comptroller." Prior to accepting the check the store owner, Mr. Moses, questioned petitioner about his identity. Petitioner stated that he was

[1] The transcript of trial ("Tr.") has been filed with the Clerk of this Court.

Thomas F. Butler, produced a signed social security card in that name and said the check was a payroll check (Tr. 5–6). In fact, the American Oil Company had never maintained any checking account in the Fulton National Bank, and had never had a comptroller named Henry L. Carpenter (Tr. 22–27).

2. On November 28, petitioner, his wife, and two others, William Freeman and a female acquaintance, were staying at a motel in Monroe, Louisiana. The Monroe police department, which had information that petitioner was a parole violator, learned of his whereabouts. At approximately 1:30 p.m. Detective Johnson and another officer proceeded to the motel to arrest petitioner. They learned that rooms 711 and 713 were occupied by petitioner and Freeman. Both rooms had been registered in the name of "H. Hunter." (Tr. 38). Johnson knocked on the door of room 713, and heard a voice from within tell him to come in. Upon entering, Johnson saw two women in room 713, and observed petitioner standing in a doorway connecting rooms 713 and 711 (Tr. 39). Petitioner immediately entered room 713 and was placed under arrest. Johnson then conducted a visual inspection of room 713. He looked into room 711, and observed a typewriter, a checkwriter, and check blanks in an open attache case (Tr. 40). Johnson ascertained that petitioner and his wife occupied room 713 and that Freeman and his companion occupied room 711.

At police headquarters, the detective obtained a written consent from petitioner to search room 713 (Pet. A4). Freeman, who had been arrested on another charge in a nearby department store parking lot

shortly before petitioner's arrest (Tr. 39), signed a written consent to the search of room 711. Johnson returned to the motel rooms and seized certain items from room 711, including blank checks identical to that passed at the Moses Melody Shop in Little Rock two weeks before (Tr. 79–80, Gov't Exh. 5).

3. At trial petitioner's counsel contended that the search of the room where the blank checks were found was not incident to petitioner's arrest and was made without his consent. The court conducted a hearing out of the jury's presence, after which it ruled that the search and the seizure of the checks printed with the American Oil Company name was proper (Tr. 64–67).

There is no basis to petitioner's claim that the evidence seized in room 711 was improperly admitted against him. The record establishes that both petitioner and Freeman gave the police consent to search the rooms that they occupied. Indeed, at trial petitioner's counsel argued, "Carlton gave his waiver. He had nothing to hide. He said, 'go ahead and search it.' " Moreover, since Freeman, not petitioner, occupied room 711, Freeman's consent alone was sufficient to justify the search. See also *Alderman* v. *United States*, No. 133, O.T., 1967, decided March 10, 1969.

It is therefore respectfully submitted that the petition for a writ of certiorari should be dismissed or denied.

ERWIN N. GRISWOLD,
Solicitor General.

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